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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ABEL ANTHONY GARCIA, JR.,

Defendant and Appellant.

2d Crim. No. B260932  
(Super. Ct. No. 2014024931)  
(Ventura County)

Abel Anthony Garcia, Jr., appeals from the trial court's order denying his petition for recall of his felony "second-strike" sentence and for resentencing to misdemeanor "shoplifting" pursuant to Proposition 47, the Safe Neighborhoods and School Act. The People concede that the trial court erred in concluding that appellant was ineligible for resentencing. We accept the concession and reverse.

*Facts*

Appellant waived his right to a preliminary hearing; accordingly, the following facts are taken from the probation report. Appellant entered a store, purchased a power saw worth \$200, and charged the purchase to the account of his former employer, the Door Outlet. Appellant was wearing a shirt with "Door Outlet" printed on the front. After the purchase, appellant and his brother went to a pawn shop. His brother "signed a pawn slip and received \$50 for the saw." Appellant used the money to buy heroin. The Door Outlet did not authorize appellant to purchase the saw.

### *Procedural Background*

A two-count felony complaint charged appellant with second-degree burglary (Pen. Code, §§ 459, 460)<sup>1</sup> and misdemeanor petty theft. (§§ 484, subd. (a), 488.) The burglary count alleged that appellant "did enter a commercial building occupied by Pawn Shop of Ventura with the intent to commit larceny and any felony." The petty theft count alleged that appellant "did unlawfully steal, take, and carry away the personal property of another, to wit, The Door Outlet Business."

Appellant pleaded guilty to second-degree burglary. He admitted one prior strike conviction for residential burglary within the meaning of California's "Three Strikes" Law. (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i).) In October 2014 the trial court sentenced him to the low term of 16 months, doubled to 32 months because of the strike. The court dismissed the misdemeanor petty theft charge.

At the general election on November 4, 20014, the voters approved Proposition 47, which enacted the Safe Neighborhoods and School Act (the Act). It went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) The Act added section 459.5 to the Penal Code. The section creates the offense of "shoplifting," which is defined as "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours where the value of the property taken or intended to be taken does not exceed" \$950. (*Id.*, subd. (a).) Except for special situations not applicable here, shoplifting is a misdemeanor. (*Ibid.*)

The Act also added section 1170.18 to the Penal Code. The section provides that a person who is "currently serving a sentence for a conviction . . . of a felony . . . who would have been guilty of a misdemeanor under the [A]ct . . . had [it] been in effect at the time of the offense may petition for a recall of sentence . . . to request resentencing" under the misdemeanor statute. (*Id.*, subd. (a).) If the petitioner satisfies certain criteria, "the petitioner's felony sentence shall be recalled and the petitioner resentenced to a

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<sup>1</sup> All statutory references are to the Penal Code.

misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (*Id.*, subd. (b).)

On November 24, 2014, appellant filed a petition for recall of his sentence and for resentencing to a misdemeanor under section 459.5. At a hearing on the petition, the court declared that appellant's offense is "not a shoplift type of 459[.5] that is specifically addressed in the statute" because he "entered the building with the intent to cash a . . . pawn slip." Defense counsel responded: "Your honor, you're looking at the pawn shop. The victim in this case is actually a Door Outlet Company." Counsel continued: "[Appellant] entered the company and actually purchased the tool by signing the purchase order. It was worth under \$200, and it was done during the regular business hours." The court replied, "That's not a shoplift in my view." It denied appellant's petition.

#### *Appellant Is Eligible for Resentencing*

As defined by section 459.5, the offense of shoplifting requires an "intent to commit larceny." (*Ibid.*) The meaning of "larceny" is clear and unambiguous. "Larceny requires the taking of another's property, with the intent to steal and carry it away. [Citation.] 'Taking,' in turn, has two aspects: (1) achieving possession of the property, known as 'caption,' and (2) carrying the property away, or 'asportation.' [Citations.]" (*People v. Gomez* (2008) 43 Cal.4th 249, 254-255, fn. omitted.) "[L]arceny requires a 'trespassory taking,' which is a taking without the property owner's consent. [Citation.]" (*People v. Williams* (2013) 57 Cal.4th 776, 788.)

Count 1 of the felony complaint alleged that appellant had committed second-degree burglary when he entered the pawn shop "with the intent to commit larceny and any felony." Appellant pleaded guilty to this count. The issue is whether appellant would have been guilty of misdemeanor shoplifting in violation of section 459.5 if the Act had "been in effect at the time" that he entered the pawn shop. (§ 1170.18, subd. (a).)

Appellant entered the shop with the intent to pawn the saw. Since the purchase of the saw had been charged to the Door Outlet's account, the Door Outlet was the legal owner of the saw. "Pawning another's property does not necessarily constitute larceny.

'Whether or not the pledging or pawning of another's property . . . affects the status of the taker as guilty of larceny . . . depends on the extent to which the act of pledging or pawning the property taken negates the intent permanently to deprive the owner of his property. . . . The actual pledging or pawning seems to be regarded as neutral, the important factor being whether the accused intended to redeem the property and had the ability to do so.' [Citations.]" (*People v. MacArthur* (2006) 142 Cal.App.4th 275, 281, fn. 6.)

By pleading guilty to count 1 of the felony complaint, appellant admitted that he had intended to permanently deprive the Door Outlet of its property. Such an intent is an element of larceny (*People v. Davis* (1998) 19 Cal.4th 301, 305), and Count 1 alleged that appellant had harbored "the intent to commit larceny."

Thus, appellant was eligible for resentencing to a misdemeanor under section 459.5. He had "enter[ed] a commercial establishment [the pawn shop] with intent to commit larceny while that establishment [was] open during regular business hours," and "the value of the property taken or intended to be taken [did] not exceed" \$950. (*Id.*, subd. (a).)

#### *Unreasonable Risk of Danger to Public Safety*

A petitioner who is eligible for resentencing to a misdemeanor under the Act shall be resentenced unless the court "determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) The People argue that this case "should be remanded to the trial court to conduct the proper public safety analysis."

Section 1170.18, subdivision (c) defines unreasonable risk of danger to public safety as "an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." The specified violent felonies are a sexually violent offense, certain sexual offenses committed against children, a homicide or attempted homicide offense, solicitation to commit murder, assault with a machine gun on a peace officer or firefighter, possession of a weapon of mass destruction, and "[a]ny serious and/or violent

felony offense punishable in California by life imprisonment or death." (§ 667, subd. (e)(2)(C)(iv)(I)-(VIII).)

On remand, the trial court is not required to conduct a public safety analysis unless the People present evidence of a risk that appellant will commit one of the specified violent felonies. The record on appeal contains no evidence of such a risk.

*Disposition*

The order denying appellant's petition is reversed. The matter is remanded to the trial court with directions to grant the petition and resentence appellant to a misdemeanor under section 459.5 unless it "determines that resentencing [him] would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) The trial court shall give the parties advance notice of the resentencing hearing.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Patricia M. Murphy, Judge  
Superior Court County of Ventura

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